

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20533
Docket Number MW-20401

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(**Elgin**, Joliet and Eastern Railway Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood that:

(1) The Carrier violated the Agreement when it awarded to R. **Lozano** the position of Welder Foreman instead of awarding said position to R. C. **Gayton**, the senior applicant (System File **TJ-1-72/UM-1-72**).

(2) The position of welder foreman now be awarded to R. C. **Gayton**, **with** compensation awarded to the extent of the difference between the welder **foreman's** rate and the welder's rate, plus all overtime, for the period extending from January 20, 1972 (date of Bulletin 5152-A) until the claimant is placed on the position in question.

OPINION OF BOARD: Rule 4 of the Agreement states:

"**Rule 4.** Seniority rights of all **employees** are confined to the sub-department and group in which **employed**, except as otherwise provided herein. The sub-departments are as follows:

1. Bridge and Building.
2. Track.
3. Scales and Work Equipment.

* * *

"Track Sub-Department

- Group 1**
- (a) Track **Foremen**
 - (b) Assistant Track Foremen
 - (c) Section Laborers
 - (d) Extra Gang Laborers
 - (e) Trackwalkers

* * *

- Group 3**
- (a) Welder **Foremen**
 - (b) Welders
 - (c) Grinder Operators
 - (d) Grinder and Welder Helpers

* * *"

Rule 5 of the Agreement states:

"Rule 5. (c) Seniority rights of employees in system **thermit**, electric and acetylene welding crews will extend over entire railroad. Seniority rights of highway crossing watchmen and **gatemen** will be confined to the **division on** which they are employed.

(d) Except as otherwise provided in this rule, track sub-department employees will have seniority rights at **any** one time only in the territory **over** which one **Roadmaster** has jurisdiction."

Rule 6(a) of the Agreement states:

"Rule 6. (a) Except as provided in paragraphs (b) and (c) of this rule, vacancies or new positions will be filled first by employees holding seniority in the group and rank in which the vacancy or new position occurs; if not so filled, they WILL be filled by qualified employees in succeeding lower ranks IN THAT SENIORITY GROUP in accordance with Rule 8. In the event that vacancy or new position is **not** so filled by employees in the **seniority** group in which it **occurs**, then it will be filled by qualified employees from other seniority groups in the respective sub-department desiring it before employing new men. **Employees** so assigned will retain their seniority rights in their respective groups from which taken."

A Welder Foreman retired in **early** 1972 and the vacancy was posted for bid. Claimant (**Gayton**) and Lozano submitted bids, and the position was awarded to **Lozano**. At the **time**, both individuals held seniority in Group 3, but Claimant was senior to Lozano as a welder.

In the documents submitted to this Board, there is considerable discussion of the ability and **merit** of the respective applicants, as that relates to Rule 8:

"**Rule 8**. Promotion shall be based on ability, **merit**, and seniority. Ability and merit being sufficient, seniority shall prevail, management to be the judge of ability and merit, subject to appeal."

However, we find that the Carrier did not raise the question of Claimant's abilities when the matter was being considered on the property. In the initial claim, the Local Chairman stated:

"I understand that Carrier did not decline promotion for Mr. **Gayton** per Rule 8."

Carrier did not, on the property, contest that understanding. In the final denial letter, Carrier cited Award 14320, which dealt with ability and merit, but, **it** was cited concerning **Rule 12(i)**. The final paragraph stated:

"In **summary**, based on **Rules 8 and 12(i)**...."

However, based upon the Local Chairman's direct statement, cited above, Carrier was obligated to raise **Claimant's** qualifications in more specific **terms** if it desired to defend its action based upon Rule 8.

Rather, the Board concludes that Carrier based its action on Rule 12(i):

"(1) An **employee** promoted from a lower to a higher rank will rank above an **employee** declining promotion. An **employee** accepting promotion will have priority in consideration for further promotion."

Lozano had been awarded a Track Foreman position in 1971 (in Group 1). **Thus**, Carrier argues that **Rule 12(i)** required it to promote **Lozano** instead of Claimant.

Carrier places significant reliance upon Award 14320, which considered a dispute between these same parties, and urges that the instant dispute is identical in principle. Accordingly, Carrier states that the doctrine of Res Judicata requires a denial of the claim. We do not concur with Carrier's conclusion. Regardless of the arguments and **contentions** which **may** have been advanced in the prior docket, Award 14320 does not base its conclusions on **Rule 12(i)**. Although the Award cites the **Rule**, it denied the claim based upon a showing that the senior employee did not possess sufficient ability and merit.

The Organization argues that Rule 6(a) controls. No employee holding seniority as a Welder Foreman bid for the position. Thus, under **Rule 6 (a)** the senior employee in the succeeding lower rank should have been selected. The Carrier could not consider seniority in other than Group 3, and accordingly, **Rule 12(i)** does not apply. Further, the Claimant urges that **Rule 12(i)** applies only when previous promotion is made "**within**" the seniority group in which the new vacancy or position occurs.

We have little difficulty in reading Rules **6(a)** and **12(i)** in harmony, when we confine our consideration to one group. If an employee fails to seek promotion within his group, he does so at his peril concerning future promotions within the group. However, when we consider the facts of the instant case, a harmonious reading of the two rules becomes obscured, and we concur with Carrier's **statement** that the rules are rather **complex**. We presume that, under Carrier's contentions, each employee, regardless of his group, must bid on every permissible position of "promotion" in other groups within his sub-department, which would appear to be a rather disruptive result. On the other hand, we may not rewrite the Agreement. Rule 12(i) is broad in its terms and **Rule** 6(a) allows employees to bid from one seniority group to another within the sub-department. Rule 7 defines promotion as "...an advancement from a lower to a higher rank." Thus, Carrier's position is not untenable.

Claimant has the burden of proof. While we find merits in the contentions of both parties, we are unable to state that Claimant has **demonstrated**, by a preponderance of the evidence, that **Rule 12(i)** is as limited as Claimant **suggests**. Accordingly, we will dismiss the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction **over** the dispute involved herein; and

That the claim be dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A. W. Pauls*
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of November 1974.